Supreme Court, U.S.
FILED
DEC 27 1979
MICHAEL RODAK, JR., CLERK

No. 79-691

In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANAPOLIS POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

RAYMOND N. ZAGONE
RONALD C. HAUSMANN
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The order of the court of appeals (Pet. App. A2-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1979. The petition for a writ of certiorari was filed on October 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed the designation by the Administrator of the Environmental Protection Agency of Marion County, Indiana, as a nonattainment area under Section 107(d) of the Clean

Air Act, after a state trial court found that the state's submission of its recommended designation to the Administrator did not comply with state law.[1]

STATEMENT

In the Clean Air Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676), Congress directed that the national ambient air quality standards established under Section 109, 42 U.S.C. (Supp. I) 7409,[2] be attained throughout the country by mid-1975. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975); and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). However, in considering the 1977 amendments to the Act, Congress became aware that those standards still had not been achieved in many areas of the country. This was attributed to inadequate restrictions for certain sources of pollution, insufficient enforcement of other restrictions and noncompliance by pollution sources. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 207-211 (1977).

As a result of the widespread failure to meet the original statutory deadline, Congress, in the 1977 amendments, adopted a new regulatory approach. The first step was to identify all areas where the air quality

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[1]Petitioners present two other questions (Pet. 3), which are identical to the questions presented in the petition for a writ of certiorari in *United States Steel Corp.* v. *United States Environmental Protection Agency*, No. 79-486. For the reasons stated in our brief in opposition in that case, those questions do not warrant review by this Court. We are sending counsel for petitioners a copy of our brief in opposition in *United States Steel*.

[2]The Clean Air Act (formerly 42 U.S.C. 1857 *et seq.*) is now codified as 42 U.S.C. (Supp. I) 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. In this brief, citations will refer to the current codification of the Clean Air Act, as amended.

was below the applicable standards and to designate those areas as "nonattainment areas." Section 107(d)(1), 42 U.S.C. (Supp. I) 7407(d)(1). Each state was required under Section 107(d)(1) to assess its air quality and to submit a recommended list of area designations to the Environmental Protection Agency (EPA) by December 5, 1977. Pursuant to Section 107(d)(2), the Administrator of EPA was to review the information submitted by each state agency and its recommended designations and promulgate a final list, with any modifications he deemed necessary, by February 3, 1978. For the designated nonattainment areas, the 1977 amendments require that each state adopt a revised implementation plan imposing the additional pollution restrictions needed to ensure attainment of the air quality standards as expeditiously as possible. Sections 171-178, 42 U.S.C. (Supp. I) 7501-7508. Each state's revised plan is subject to EPA review and approval. Section 129(c) of Pub. L. No. 95-95, 91 Stat. 750, 42 U.S.C. (Supp. I) 7502 note.

On March 3, 1978, the Administrator published the list of area designations for the entire country. 43 Fed. Reg. 8962 (Pet. App. A52-A64). For the State of Indiana, the Administrator specified 52 separate area designations; he modified ten designations recommended by the State. 43 Fed. Reg. 8992-8993 (1978). In particular, the Administrator designated Marion County, Indiana, as a nonattainment area for both the primary and secondary sulfur dioxide standards (Pet. App. A63). This designation followed the recommendation of the Indiana Air Pollution Control Board, which based its recommendation on an analysis of air quality in Marion County performed by the technical staff of the Air Pollution Control Division of the Indiana State Board of Health (*id.* at A3-A6).

The nonattainment designations were made immediately effective without prior notice or an opportunity for comment. See 5 U.S.C. 553(b) and (d).[3] However, the Administrator solicited public comment on the designations for 60 days and committed the agency to revise the designations as appropriate in light of those comments (Pet. App. A54).

Petitioners sought judicial review of the designations in the court of appeals under Section 307(b)(1), 42 U.S.C. (Supp. I) 7607(b)(1). Thereafter, the court granted EPA's motion to stay the proceedings on appeal pending the agency's consideration of public comments with regard to its nonattainment designations. On October 5, 1978, the Administrator issued a revised list of designated nonattainment areas. 43 Fed. Reg. 45993, 46007-46008 (Pet. App. A65-A73). The Administrator determined that Marion County should be reclassified as an attainment area for the secondary sulfur dioxide standard, but, based on "[t]he overwhelming weight of evidence" (consisting of air quality monitoring data and dispersion modeling), he affirmed the nonattainment designation for the primary sulfur dioxide standard (*id.* at A70).

The court of appeals affirmed EPA's nonattainment designation for Marion County (Pet. App. A2-A11). The court rejected as untimely petitioners' contention that the Administrator's designation was based on actions by the

[3]In *United States Steel Corporation* v. *United States Environmental Protection Agency*, 605 F. 2d 283 (1979), the Seventh Circuit held that EPA had "good cause" under the Administrative Procedure Act to promulgate the designations as immediately effective. The question concerning the propriety of that action is presented in the petition for a writ of certiorari in *United States Steel Corp.* v. *United States Environmental Protection Agency*, No. 79-486. See note 1, *supra*.

state agency that did not comply with state procedural requirements, finding that petitioners had failed to raise that issue before EPA during the court-sanctioned comment period (Pet. App. A6). In addition, the court concluded that it was not bound by the determination of a state trial court that the state agency's submission of its recommended designation list to EPA did not comply with Indiana law (*id.* at A7). Moreover, the court ruled that the Administrator does not have authority under Section 107(d) to change the state's recommended designation "merely because the Indiana Air Pollution Control Board may not have complied strictly with state procedural requirements" (*ibid.*). The court noted that if the state later develops new technical information necessitating a change in the Marion County designation, the Administrator must evaluate the information and change the designation if he agrees that such a change is warranted (*ibid.*).

ARGUMENT

Petitioners contend (Pet. 7-13) that the court of appeals was required to invalidate the Administrator's designation of Marion County as a nonattainment area because a state trial court has determined that the state failed to comply with state law when it submitted its recommended designation to the Administrator. The court of appeals correctly rejected that contention, and its decision, which does not conflict with any decision of this Court or of the courts of appeals, does not warrant review.

This Court has considered at length the history and provisions of the Clean Air Act in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). The Court has found that the 1970 "Amendments reflect congressional dissatisfaction with the progress of existing

air pollution programs and a determination to 'tak[e] a stick to the States,' * * * in order to guarantee the prompt attainment and maintenance of specified air quality standards." *Id.* at 249, quoting from *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 64. The 1977 amendments reaffirm that congressional goal and establish a new regulatory scheme to remedy the past failure to achieve those standards. See pages 2-3, *supra*.

1. In arguing (Pet. 7-9) that the decision below disregards the statutory division of responsibilities between EPA and the states, petitioners fail to distinguish between the promulgation of area designations by the Administrator under Section 107(d) and his limited review of state implementation plans under Section 110(a)(2). Consequently, their reliance on this Court's decision in *Union Electric Co.* v. *EPA*, *supra*, is misplaced. Under Section 110(a)(2), 42 U.S.C. (Supp. I) 7410(a)(2), each state was free to develop its own implementation plan, and the Administrator was required by law to approve any plan that met the minimum conditions of the statute. See *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 65, 79; *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 264-265. "So long as the national standards are met, the State may select whatever mix of control devices it desires." *Id.* at 266. See *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79. Thus, the Court in *Union Electric* concluded that challenges to a state's selection of control devices based on economic or technological infeasibility could not be presented to the Administrator but instead could only be brought before the appropriate state agency, or in state court.

This Court's construction of Section 110(a)(2) in *Union Electric* has no bearing on petitioners' claim pursuant to Section 107(d). Under Section 107(d)(1), the states were required to submit to EPA a list identifying nonattainment areas. In contrast to the narrow limits placed on the Administrator's discretion in approving or disapproving a state implementation plan under Section 110(a)(2), the Administrator had broad discretion under Section 107(d)(2) to modify the state list "as he deem[ed] necessary." The Administrator, not the states, had the ultimate responsibility for the designations, and they were promulgated solely as a matter of federal law.

Moreover, the designation of an area as nonattainment does not change the pollution control requirements of an existing implementation plan; it only triggers a state's obligation to adopt and submit a revised implementation plan. We have been informed that the State of Indiana has submitted its revised plan to EPA. Petitioners have every opportunity to raise pertinent objections to that plan before the Administrator and appropriate state authorities.[4]

2. Petitioners also contend (Pet. 10-13) that the court of appeals' refusal to follow a decision by a state trial court violates principles of collateral estoppel and full faith and credit. This contention is insubstantial. As the court of appeals correctly concluded (Pet. App. A7), state law cannot restrict the scope of the Administrator's authority under Section 107(d) to promulgate nonattainment designations. The Administrator is not empowered

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[4]This case does not raise, and hence we do not here address, the question of what effect, if any, a state court decision overturning a state implementation plan on procedural grounds would have on federal enforcement of the substantive provisions of the plan approved by EPA under Section 110(a)(2).

under Section 107(d) to reject a state's designation recommendations on the ground that the state failed to comply with its own procedural requirements in preparing and submitting the recommendations to EPA. Thus, a finding of procedural irregularity under state law is irrelevant to the validity of the Administrator's action under the federal statute.

The nonattainment designation, moreover, is subject to modification. As the court of appeals observed (Pet. App. A7), if the State of Indiana develops new technical information concerning air quality in Marion County, and submits a proposed change in the nonattainment designation for that area, the Administrator is required under Section 107(d)(5) to review the submission and make any appropriate changes in the area designation. The possibility that the nonattainment designation may be modified through administrative action provides an additional reason for denying the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

RAYMOND N. ZAGONE
RONALD C. HAUSMANN
Attorneys

DECEMBER 1979

DOJ-1979-12